Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS DiMICCO,

Petitioner,

vs.

THE CITY OF NEW YORK; BENJAMIN WARD AS POLICE COMMISSIONER OF THE CITY OF NEW YORK; THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; and THE POLICE PENSION FUND, ARTICLE II,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THOMAS DiMICCO
Pro Se
60-35 Fresh Pond Road
Maspeth, New York 11378
(718) 366-4965

QUESTIONS PRESENTED

1. Does the petitioners new evidence meet all the standards to qualify as Newly Discovered Evidence.

2. Are the New York State Courts deficient to handle appeals from Police Administrative Trials.

3. In the New York State Court Of Appeals decision in the Berenhaus and Farry v. Ward case, they stated that in Police Administrative Trials, where the charges of misconduct are of a criminal nature, corroboration is not required. Isn't this discrimination against Police Officers in New York State, and is this decision unconstitutional.

4. In view of all the inequities and violations of the law committed against the petitioner in this case, should he still be barred by res judicata, or can his Government do something to protect his Constitutional Rights that were

violated by the New York City Police Department.

5. Are the laws of ERISA Unconstitutional.

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THOMAS DIMICCO

Petitioner,

vs.

THE CITY OF NEW YORK; BENJAMIN WARD AS POLICE COMMISSIONER OF THE CITY OF NEW YORK; THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; AND THE POLICE PENSION FUND, ARTICLE II.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Thomas DiMicco, respectfully requests a Writ of Certiorari to review the judgment and opinion of the United States Court Of Appeals for the Second Circuit, entered in the above entitled proceeding on September 22, 1993.

OPINIONS BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

The opinion of the Court of Appeals is reprinted in Appendix A at pages 1a to 4a.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

The opinion of the District Court is reprinted in Appendix A at pages 4a through 6a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit of which review is sought was entered on September 22, 1993.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Petitioner seeks redress for the denial of his Constitutional Right To Due Process, 42 U.S.C. § 1983.

STATEMENT OF THE CASE

On August 1, 1986 after serving more than 20 years as a Police Officer, and 13 of those years as a Detective, the petitioner was dismissed from the Police Department, based on nothing more than the accusations made by 2 convicted felons.

The petitioner became known to these 2 convicted felons, Robert Arminante and Anthony Rosso, through a small building he purchased in July of 1979, located at 60-35 Fresh Pond Road, Queens, New York. He had rented office space and use of the basement to a trucking firm, known as EMD Trucking. Both Arminante and Rosso were affiliated with EMD Trucking.

Investigation Against Petitioner

This whole case began on May 26,1983 at 9:30 in the morning, when a career criminal named Robert Arminante, who needed the Police Departments help, met with a detective he knew from the Internal Affairs Division, Detective Vincent Murano. At that time he told Detective Murano that there was a trucking firm located at the petitioners building whose trucks were used in the transportation of narcotics and stolen property, involving organized crime figures, and a member of the Police Department. He also stated that on several occassions during the last few months, he had been hired to drive a rented truck, and make pick ups at Kennedy Airport of a drug he believes is known as Propanone. He then accused the petitioner Detective DiMicco of riding shotgun in a trail vehicle on the 3rd. trip he had made, [A-138].

On this very same date, May 26, 1983 Mr. Arminante later appeared at the Bronx Supreme Court, and pled guilty to selling drugs to an Undercover Police Officer, [A-6,7]. Mr. Arminante is a career crim--inal who has never served anytime in jail, because he knows just how to use the Police Department everytime he is in trouble with the law. On July 5, 1983, about 2 weeks after Mr. Arminante was sentenced to probation by the Bronx Supreme Court, and he no longer needed the Police Departments help, he told them he did not want to cooperate with them anymore,[A-9].[1]

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[1] Numbers preceded by the letter [A-] refer to pages of the appendix submitted to the Court of Appeals. Numbers in parenthesis, not preceded with an [A-] are citations to Plaintiffs Memorandum of Law, submitted to the District Court.

Although Mr. Arminante was no longer cooperating with the Internal Affairs Division, the Chief of Detectives, Field Internal Affairs Unit continued to try to make a case against the petitioner, based on the accusation Mr. Arminante had made.

The Police Investigators Reports (Discovery Material), show that 1 year and 3 months later in September of 1984, Mr. Arminante came back to the Field Internal Affairs Unit, again through Detective Murano, under the pretense that he wanted to get paid for his information . At this time Mr. Arminante was also concerned if the "FEDS" were working on this case, [A-14,15]. His real motives soon became apparent in October 1984. Several Police Reports (Discovery Materi--al) show that mr. Arminante did not begin to cooperate with the investigators until they had arranged for him to receive immunity from the State Special

Prosecutors Office, for his past criminal activities,[A-16,17,18]. On October 15, 1984 after he received this immunity, Mr. Arminante accused the petitioner of also being involved with a truckload of sto--len merchandise,[A-18]. Less than 2 months later on December 4, 1984, Anthony Rosso and a group of people were arrested by Federal Agents at A&V Trucking in Kearny, New Jersey, for being involved with shipments of the drug Propanone,[A-48,49,50,51]. Did the I.A.D. Detective Murano know that the Federal Authorities were close to making an arrest when he contacted Mr. Arminante on September 25, 1984,[A-14]. One thing is for sure, Mr. Arminante had escaped from going to jail again, thanks to Detective Murano and the Police Investigators. A Police Report shows that on December 13,1984, Detective Murano had been in contact with the F.B.I ., who had agreed to give the C.I.(Mr.

Arminante) immunity, and upon his further cooperation, would relieve him of his life-time parole,[A-125]. During the course of the Internal Affairs 3 year in--vestigation against the petitioner, not one shred of evidence was ever established to support the accusations that Mr. Arminante had made. In fact just the opposite had occurred on January 30, 1985 when the State Special Prosecutors Office secretly wired Arminante to engage the petitioner in a conversation to try to support the accusation he had made. This recorded conversation proved that Mr. Ar--minante's accusations against the petit--ioner were without merit, and were totally fabricated so that the Police Investigators would help him stay out of jail. At the Police Trial the petitioners attorney proved that this recorded con--versation proves that the petitioner had nothing to do with any criminal activity

that may have been committed by Mr. Ar-
-minante or EMD Trucking,[A-68,69,70,71]. Three months later on April 30, 1985 the State Special Prosecutors Office closed the case against the petitioner, Thomas DiMicco as UNSUBSTANTIATED,[A-37], but that didn't stop the investigators from the Field Internal Unit, as they were determined to make a case against the petitioner. In a last desparate attempt to support the accusations, the Internal Affairs Investigators and Lieutenant Medican, from the Department's Advocate's Office made a deal with another convicted felon who serving time in a Federal Pris-
-on for his involvement with the ship-
-ments of the drug Propanone. Lieutenant Medican promised Mr. Anthony Rosso that he would write a favorable letter to his Parole Board, if he cooperated with them in this case and testified against the petitioner,[A-52,53,54]. Police Reports

and arrest reports show that Mr. Rosso's accusations were not only inconsistent with his own statements, but were also inconsistent with the accusations that Mr. Arminante had made,[A-45,49,56,60,80]

Police Hearing

In March of 1986 the petitioner made an appointed with the Police Departments Pension Section for April 15, 1986 to process his retirement papers for twenty years of service. On April 4, 1986 the Field Internal Affairs Unit gave the petitioner a Police Hearing, and asked him questions pertaining to the accusa--tions Mr. Arminante and Mr. Rosso had made against him. The petitioner answered all of their questions and denied all of the accusations. This was the first time that the Field Internal Affairs Unit had made the petitioner aware that they had been conducting an investigation against him for the last 3 years. At the comple-

-tion of this Hearing, the petitioner was ordered to surrender his gun and shield and was suspended from the Police Depart--ment without pay, by the Commanding Officer of the Chief of Detective's, Field Internal Affairs Unit, Captain James Wrynn. Captain Wrynn and Lieutenant Korman then asked the petitioners assign--ed attorney to leave the room as they wanted to talk to the petitioner in pri--vate. They then proceeded to praise the petitioners record as a Police Officer, especially his undercover work. Captain Wrynn then told the petitioner that he had 3 choices, 1- He could work for them undercover and save his job and pension. 2- He could resign. 3- He could go to the Police Trial Room, where they would take his job and pension away. Knowing the accusations to be false and believing that he would receive a fair Police Trial he chose the latter. What the petitioner

did not know at that time was that Captain Wrynn's choices, were actually a threat, and in choosing the latter, his faith was doomed, as the Police Trial was stacked with a biased and dishonest Trial Commissioner.

The Charges

On April 7, 1986 the petitioner was served with the following charges;
Charge 1 & 2 stated that Det. DiMicco, sometime during the Spring to the Fall of 1982, did wrongfully permit quantities of an illegal substance to be stored on his private property, and was involved in it's transportation during the same time period.
Charge 3,4 and 5 stated that Det. DiMicco , sometime during the Summer to the Fall of 1982, did wrongfully permit two truck--loads of stolen merchandise to be stored on his private property, and that he did arrange for the sale and delivery of

stolen merchandise, and did wrongfully transport stolen merchandise from 60-35 Fresh Pond Road, Queens, to 945 Yonkers Avenue, Yonkers.

Charges 6 & 7 stated that Det. DiMicco sometime in the year 1982 did wrongfully sell quantities of Cocaine on two occas--ions for $200 dollars, and did wrongful--ly supply a quantity of Marijuana to a male known to this Department.

Police Trial Conference

The petitioner had retained an attorn--ey who was very familiar with Police Administrative Trials, Mr. Bruce Cutler. Within the next few weeks several Trial Conferences were held and the trial date was set for May 8, 1986. At that time the petitioners attorney had a busy trial schedule, so he requested an adjournment to a date in early June 1986, so he would have adequate time to prepare, and obtain discovery material. This request was

denied by the Police Trial Commissioner, even though there was no valid reason, as the petitioner had withdrawn his retirement papers. As a result of the Trial Commissioners refusal to grant this adjournment, and the rushed prosecution of this case, the petitioner was not allowed to have the attorney he had chosen to represent him at his Police Trial. The petitioner was forced to settle for an attorney who had no experience at Police Administrative Trials.

The Police Administrative Trial

The Police Trial was even more outrageous than the charges as the inconsistent testimony of both Mr. Arminante and Mr. Rosso was just as vague and indefinite, with no dates or times of the alleged crimes. The testimony they gave was inconsistent with the previous statements they had given to the Police Investigators. Several of the Police

Reports (Discovery Material) prove this and prove that both witnesses had told lies during their testimony. The petit--ioners attorney tried to introduce the Police Reports into evidence, but the Trial Commissioner adamantly refused to allow any of the Police Reports to be admitted into evidence,[A-11,12,13]. This concealed crucial facts from becoming part of the Trial Records, which were never the subject of review by the New York State Courts. None of the charges were proven against the petitioner at the Police Trial, as the 2 witnesses did not corroborate each others accusations. At the conclusion of the Police Trial on May 9, 1986 the Trial Commissioner stated that he would submit a Written Decision to the Police Commissioner, Benjamin Ward with his Findings and Analysis, and recommendations.

Written Decision

This Written Decision was very clever--ly worded, and when you first read it, it appears to contain the facts of the Police Trial with a few mistakes and some inaccurate statements. However, when each paragraph is more closely examined, and compared with the testimony of the Police Trial Records, it shows that this Written Decision was nothing more than a pack of cleverly worded LIES, that were purposely made to deceive the Police Commissioner into believing that the petitioner had been found guilty at his Police Trial. This 23 page Written Decision contained more than 30 inaccurate statements of the real facts, and most of them were vicious outright lies. The petitioner clearly displayed some of the lies that were made by the Trial Commissioner in the Appellants Brief to the Court of Appeals on (pgs.14 -26), and his Appendix,[A-60

to A-138]. The petitioner first listed each lie from this Written Decision separately, followed by either the real facts or testimony from the Police Trial Records. Most of the lies were told to show some corroboration, because none existed at the Police Trial, some were told to connect the petitioner with the alleged crimes, some were told to distort the true facts of this fabricated case, and some lies were told to conceal the witnesses motives for fabrication. What the Trial Commissioner, Hugh H. Mo did in preparing this Written Decision, was a Travesty of Justice, and constitutes the crime of Official Misconduct,(§ 195.00 N. Y.S. Penal Law).

This Written Decision was delivered to the petitioners attorney's office late Friday afternoon, July 25,1986, and be--cause of the weekend, the petitioner or his attorney did not review it until Mon-

-day, July 28, 1986. The Cover Letter of this Written Decision stated the follow--ing;[A-139,140]

Please submit any comments concerning either the facts or recommended penalty, in writing, no later than July 29, 1986. Your comments, together with the Trial Commissioners Decision, will be submitted to the Police Commissioner. This meant that the petitioner and his attorney had only 2 days to evaluate the Written Decision, and reply before the end of the day on Tuesday, July 29,1986.

Page 3 of this Written Decision stated the respondent, through his Counsel, pleaded Not Guilty to the subject Charges and a STENOGRAPHIC TRANSCRIPT of the Trial has been prepared, and is AVAILABLE for the Police Commissioners review,[A-141]. Although the stenographic trans--script may have been available for the Police Commissioners review, It was

pretty obvious that he never compared the Written Decision with the Stenographic Transcript of the Police Trial which was 236 pages long, because only 2 days later on Friday, August 1, 1986 the Police Commissioner APPROVED the Trial Commiss--ioners Written Decision.

New York State Courts

In October of 1986, the petitioners attorney proceeded in the New York State Courts, under an Article 78 Proceeding, mainly under laws that were in effect at that time. The laws that were in effect at that time stemmed from the case of a Police Officer named Steven Berenhaus who had been dismissed from the Police Department, for misconduct of a criminal nature, based solely on the uncorroborat--ed testimony of an alleged accomplice. In the (Matter of Berenhaus v. Ward 118AD 2d 196) the New York State Appellate Division, First Department unanimously

annulled the New York City Police Departments Dismissal of Berenhaus and stated:"The Court expressly acknowledges the need for some corroboration of accom--plice testimony so as to command judic--ial confidence in it's veracity."

However, in the petitioners case the Appellate Division, First Department con--firmed the Police Commissioners decision to dismiss the petitioner, with No Opin--ion on June 25, 1987. The petitioners attorney could not understand how the Court could have reached such a different conclusion, since on matters of law, the petitioners case was identical to the Berenhaus v. Ward case, so he proceeded in the New York State Courts, requesting Leave To Appeal to the New York State Court of Appeals. What the petitioners attorney did not know at that time was, that the Police Department had appealed the Decision on the Berenhaus case to the

New York State Court of Appeals, and the Appellate Division was awaiting that Decision. On November 17, 1987 the New York State Court of Appeals reversed the Decision on the Berenhaus v. Ward case and ruled in favor of the New York City Police Department. The petitioners Leave To Appeal to the New York State Court of Appeals was DENIED on January 14, 1988.

Application To Mayor

During the time that the petitioners attorney was proceeding in the New York State Courts, the petitioner made a Written Application to Mayor Koch of New York City on July 24, 1987, requesting a re-hearing of the Charges pursuant to the Administrative Code §434a-22.0 based on all the wrongdoings committed by the Trial Commissioner during the Police Trial. The petitioner also explained that the charges were vague and indefinite and just how frivalous the whole case against

him really was. Instead of the Mayor's Office reviewing the case, they fowarded his Application to the Police Commission--ers Office,who referred this Applica--tion back to the same dishonest Trial Commissioner who committed all the wrong--doings that he complained about. On August 7, 1987 the Trial Commissioner, Hugh H. Mo advised the petitioner in writing, that he had reviewed the case and no reason could be found to re-open his case,[A-142-149].

Newly Discovered Evidence

In January, 1988 the petitioner was still determined to prove that the case against him was totally fabricated, and that he was innocent of all the charges. The weakest part of the Police Depart--ments whole case was in their charges, as they were so vague and indefinite, they were impossible to respond to at the time of the Police Trial. The petitioner

then considered all the other facts that had been establish at the Police Trial in reference to the Chagres.

1. None of the Charges contained any specific dates or times, and the only crime in these Charges that had been established, dealt with the shipments of Propanone.

2. The U.S. Attorney's Office had made numerous arrests in December of 1984. The Charges they made also included the Pro--panone shipments of 1982, so they must have the dates that those shipments were picked up , otherwise they couldn't have made those Charges,[A-49,A-80].

3. The Investigators from the Field Internal Affairs Unit must have also had the dates and times of the shipments of Propanone for 1982, and purposely with--held them from the Charges so they would be impossible to respond to.

4. Mr. Arminante testified that he had

picked up 4 shipments of Propanone, and that the petitioner was involved with the 3rd one,[A-86,A-156].

5. A police Investigators report dated June 13, 1983(Discovery Material), shows that when this case first began, Their C.I., Mr. Arminante was present at the Internal Affairs Division Office, and supplied them with information concerning the shipments of Propanone,[A-150]. The report stated that Mr. Arminante went to Columbia Shipping and picked up bogus papers from an employee named Pete Gard--ner, and then proceeded to Lufthansa Airlines at Kennedy Airportand picked up 20 fifty-five gallon drums containing Propanone. There was also information about the markings that was on these drums.

The petitioner took this information and made several trips to Lufthansa Cargo Terminal and Columbia Shipping, but was

unable to come up with any information involving these shipments, as these com--panies were only required to keep rec--ords of all business transactions for 3 years. These business transactions occurred in 1982, which meant that any--time past 1985, these companies would no longer have those records. However, the petitioner was eventually able to learn from Mr. Pete Gardner of Columbia Ship--ping that all of the records concerning the shipments of 1982 were confiscated by the U.S. Attorney's Office, Newark,N.J., and that Agent Mike Vanacore was in charge of the investigation at that time. The petitioner learned from Agent Mike Vanacore that he did have the dates that the shipments were picked up, but in order for him to obtain them he would have to contact Mr. Melvin Minsky's Office, Chief of Regional Counsel of the United States Customs, at the World Trade

Center. The petitioner was then able to contact the Assistant Regional Counsel, Amy L. Schwartz, who told him that he should have his attorney write to Mr. Minsky, requesting the dates that the 4 drug shipments were picked up. After his attorney, Richard Tannenbaum had made had made several request in writing, he was finally able to obtain the dates that the 4 shipments of the drug Propanone were picked up through a FOIA request, on May 31, 1988. It took the petitioner almost 4 months to obtain these dates, once he found out that they did exist.

After the petitioner had established that the date of the 3rd shipment of Pro--panone had been picked up on July 27, 1982, he then went to the Police Depart--ments 90 Precinct, and with the help of Detective Bernard Mcsweeney made a check of the 90 Precincts old records, which were kept in the basement. They were able

to recover Police Department records that proved the petitioner, Detective DiMicco was working a 4 PM to 1 AM tour of duty on July 27, 1982,[A-157-166].

The petitioner then went through all of his own personal papers and the records that he keeps for tax purposes on his building. He was able to find a paid bill dated July 27, 1982, for the repair of a leaking watermain, from Roebling Plumbing & Heating Company Inc. The front of this bill which is marked Paid in Full and signed by the mechanic Al Snyder, shows that the mechanic worked for 3 hours,[A-167].

The back of this bill shows that it was signed by the petitioner, Thomas DiMicco, acknowledging the sastisfactory completion of the worked performed,[A-168].

The petitioner then went to Roebling Plumbing's office and after speaking with

the owner Mr. Philip Bobrowsky, and the mechanic, Al Snyder, produced the follow--ing;

[A-169] A copy of the page dated July 27, 1982, from their Log Book for the year of 1982, showing that the mechanic Al Snyder left from Roebling Plumbing, and respond-ed to the petitioners building at 60-35 Fresh Pond Road at 9 AM

[A-170] a Sworn Affidavit from the mechanic Alfred Snyder, stating that he arrived at the petitioners building at approximately 9:30 AM, and gained access to the basement from Thomas DiMicco to repair a leaking watermain, which took about 3 hours. He also stated that the petitioner was with him the whole time he was making the repair, and that after he fixed the leak in the basement, he found that the watermain was leaking in the street also. He then contacted his employer who arrived on the job site to

confer with the petitioner at approxi-
-mately 1:30 PM.

[A-171] A Sworn Affidavit from the owner of Roebling Plumbing, Philip Bobrowsky, who stated that he arrived at the petit-
-ioners building at about 1:30 PM on July 27, 1982 and conferred with the Petition-
-er for about 1½ hours, surveying and estimating the job to repair the water-
-main in the street.

This Newly Discovered Evidence proves that the petitioner was at his building at 60-35 Fresh Pond Road, Maspeth, New York from 9:30 in the morning to at least 3 PM in the afternoon, before changing and going to work at the 90 Precinct Detective Unit, for a 4 PM to 1 AM tour of duty. It also proves that it was just not possible for the petitioner to have been with Mr. Arminante when he picked up the 3rd shipment of the drug Propanone at Kennedy Airport on July 27,

1982.

Request For New Police Trial

In all of the Charges, the Transporta--tion of Propanone was the only crime that the Police Investigators had estab--lished as ever having occurred, and was the brunt of the Police Departments whole case. Based on this Newly Discovered Evidence, the petitioner through an attorney filed a Notice of Motion with the Police Department in November, 1988, requesting a new Police Administrative Trial to consider this Newly Discovered Evidence, and also because the Police Trial was unfair.

The Police Department responded to the petitioners request by letter stating that the information offered, if proved, was discoverable before the Trial had ended and in any event, would not have affected the outcome of the proceedings. They also stated that they had no juris-

-diction to re-open the case now.

United States District Court

On July 27, 1989 the petitioners attorney filed a Complaint For Damages, Jury Demand, with the United States District Court for the Southern District of New York. The complaint stated that the petitioners Constitutional Rights To Due Process were violated, because he was not permitted to re-open his Police Trial to submit this new evidence, the Charges & Specifications were vague and indefi--nite, and therefore did not provide the petitioner with adequate notice, and that the Police Trial was unfair, and held be--fore a biased decisionmaker.

On January 5, 1990 a Pre-Trial confer--ence at the United States District Court for the Southern District of New York, Judge Richard Owen instructed the attorn--ey for the City of New York to file a Motion for Summary Judgment by March of

1990, if they felt that the petitioner, Detective DiMicco did not have a case. For 2½ years the attorney's for the City of New York, delayed submitting their Motion For Summary Judgment, requesting enlargements of time, supposedly on the grounds that they and the Police Depart--ment were exploring ways to resolve some or all of the issues in dispute. They never once got back to the petitioners attorney or the Court on the matter of resolving the issues in dispute, and after wasting 2½ years, finally submitted their Motion For Summary Judgment on June 3, 1992,(89 Civ. 5120).

On August 25,1992 the petitioners attorney submitted an Affidavit In Opposition To Defendants Motion For Summary Judgment, A Statement Of The Material Facts, and a Memorandum Of Law, to the United States District Court for the Southern District of New York.

On October 8, 1992, District Judge Richard Owen of the United States District Court for the Southern District of New York, dismissed the petitioner complaint and granted the defendants motion for summary judgment.

Because of several mistakes made by the petitioner attorney in explaining the Newly Discovered Evidence, and for some other unknown reasons, District Judge Richard Owen got all the facts about the Police Administrative Trial and this whole case totally mixed up.

The petitioner pro se then appealed this case to the United States Court of Appeals for the Second Circuit, and submitted his Brief and Appendix on February 1, 1993, (Case No. 92-9259).

On September 22, 1993 the United States Court of Appeals for the Second Circuit, affirmed the judgment of the District Court, dismissing the complaint.

ARGUMENT

The petitioners new evidence meets all the standards to qualify as Newly Disco--vered Evidence. The District Court some--how misinterpreted this new evidence and mistakenly granted the defendants motion for summary judgment. In District Judge Owen's Endorsed Memorandum he stated that he read the DiMicco administrative hear--ing transcript and it appears that DiMicco never made any effort at the hearing to fix the dates that the stolen goods were received by or delivered out of United States Customs.

This statement is nonsense, for first of all it was not stolen goods that was received by or delivered out of Customs, it was shipments of the drug propanone that were picked up from Customs, and DiMicco's attorney did try to fix the dates that these drug shipments were picked up from Customs, prior to the

start, and during the Administrative Hearing, which is shown in the transcript Judge Owen read on pages 8,62,129. The Police Department and their 2 witnesses claimed they did not know any exact dates on any of the alleged crimes involved in any of the Charges. As far as the dates that the drug shipments were picked up from Customs, the Police Department and their 2 witnesses only gave a vague time period, sometime during the Spring to the Fall of 1982.

Judge Owen also stated that DiMicco now proffers as "newly discovered evidence" alibi evidence to explain his whereabouts just on the days the goods were received by Customs, and no other.

The petitioner, DiMicco's Newly Discovered alibi evidence specifically dealt with his whereabouts on the date, (not days) that the 3rd shipment of drugs (not goods) were picked up (not Received).

The bills of lading that are mentioned in Judge Richard Owen's Endorsed Memoran--dum, are actually 4 U.S. Customs forms showing the Dates Of Entry of the 4 ship--ments of the drug propanone,[A-151-155]. The Date Of Entry for the 3rd shipment is July 27, 1982,[A-154]. This Date Of Entry is in fact the same date that the 3rd shipment of propanone was picked up from U.S. Customs. The proof of this fact is shown on the form in the date listed be--low the DATE OF ENTRY, under the caption TEAM# 02. The date listed under this cap--tion for the 3rd shipment is August 10, 1982, which was the filing date. The U.S. Customs procedural process is to list the filing date, 10 business days after the merchandise has been removed from the cargo terminal warehouse. A check of a 1982 calendar shows that August 10, 1982 was 14 days after the DATE OF ENTRY of the 3rd shipment, minus the 4 days for

weekends, and you have the 10 business days. In fact all 4 shipments were picked up on the same DATE OF ENTRY, a check with a 1982 calendar shows that after you minus holidays and weekends, all of the filing dates were exactly 10 business days after the DATE OF ENTRY. This infor--mation was obtained from the U.S. Customs Officers at the Lufthansa Cargo Terminal, who quoted from a U.S. Customs Bonded Warehouse Manual. On July 8, 1988 the petitioner obtained further confirma--tion from the Assistant Regional Counsel U.S. Customs, Amy L. Schwartz, who explained that his attorney had requested under the Freedom Of Information Act, the dates that the shipments were picked up, and that is what she sent. She also stated that the DATE OF ENTRY are in fact the dates that the shipments were picked up, and that they were not required to send anything further on those shipments.

The petitioners attorney Richard Dienst who handled this case in the United States District Court did not explain the dates on the four bills of lading clearly enough to show that the dates listed on these forms are in fact the dates that the 4 shipments of the drug propanone were picked up from the U. S. Customs, nor did he explain the fact that DiMicco was only concerned with the date that the 3rd shipment of drugs were picked up. However, he did explain that these shipments contained the drug propa--none and all of the alibi evidence show--ing DiMicco's whereabouts clearly show the date July 27, 1982, which was the date that the 3rd shipment of the drug propanone was picked up from the Lufthan--sa Cargo Terminal at Kennedy Airport.

As a result of this misunderstanding Judge Owen stated, The Proposed evidence (i.e., bills of lading, detective assign-

-ment sheets, and supporting affidavits), however, is neither "newly discovered," nor does it perform the exculpatory task DiMicco assigns it.

If the petitioners attorney had taken the time to explain this new evidence more clearly, and Judge Owen had fully understood the facts of this case and this newly discovered evidence, he would have dismissed the defendants motion for summary judgment, and this matter set down for trial.

The petitioner has shown in this Writ, pages 22 to 30, the lengthy process it took to discover and establish this new evidence. The charges were preferred against the petitioner on April 7, 1986, and the Police Trial was held one month later on May 8,9, 1986. Before the petitioner could establish this new evidence he had to first obtain the dates through a FOIA request to the U.S. Customs, and

this process alone, took over 4 months. Prior to the start of the Police Trial the petitioners attorney requested an adjournment to a date in early June, 1986 for adequate time to prepare and obtain discovery material,[A-41,42]. The Trial Commissioner denied this request, even though he had no valid reason, since the petitioner had withdrawn his retirement papers.In all the 285 Police Reports (Discovery Material) or the preferred Charges & Specifications, there was not even one date listed for any of the alleged crimes. All these reasons made it totally impossible for the petitioner to obtain this Newly Discovered Evidence at the time of his Police Trial. This new evidence not only proves that the petit--ioner could not have been involved with the 3rd shipment of the drug propanone, but also proves that the Police Investi--gators and the Police Departments

Advocate's Office must have known the dates the drug shipments of propanone were picked up way before the Police Charges were preferred. The U.S. Attorney in Newark, N.J. had these dates when they made arrests on December 4, 1984, the charges they made at that time also in--cluded the 4 drug shipments of propanone that were picked up in 1982. The Police Reports (Discovery Material), show that the Police Investigators were in constant touch with the U.S. Attorney's Office in Newark N.J. during the course of their 3 year investigation. The Police Investi--gators purposely withheld this evidence so that the petitioner would not be able to respond to the Charge. This new evidence totally discredits the accusa--tions and testimony of the Police Departments two witnesses, and therefore totally discredits the other outrageous accusations and charges, which should

never have been made to begin with.

CHARGE# 1 stated that Det. DiMicco, Dur--ing the Spring to the Fall of 1982 did allow the drug, propanone to be stored on his private property.

This charge is absurd, for even if the propanone had been stored on the petit--ioners private property, it was not under his control as he had rented an office and basement to EMD Trucking. This fact was known to the Police Department prior to making this charge, and was also established at the Police Trial,[A-111, 112,113], this charge should have never been made.

CHARGES# 3,4,5 Sometime during the Summer to the Fall of 1982, DiMicco permitted 2 truckloads of stolen merchandise to be stored on his private property, and dur--ing that same period, did arrange for the sale and delivery of stolen merchan--dise, and did transport stolen merchan-

-dise from 60-35 Fresh Pond Road, Queens, N.Y. to 945 Yonkers Avenue, Yonkers,N.Y.

As far as any of the charges dealing with this alleged stolen merchandise, the Investigators from the Field Internal Affairs Unit, never established that any crime of stolen merchandise ever occurred and they were advised by the New York District Attorney's Office, that no viable prosecution existed on this stolen merchandise,[A-38]. The accusations of this alleged stolen merchandise were made by Mr. Arminante on October 15, 1984, after the Police Investigators had arranged for Mr. Arminante to receive immunity from the State Special Prosecu--tors Office for his involvement with the shipments of the propanone,[A-20]. After 1 year and 4 months of not cooperating with the Police Investigators, Mr. Armi--nante again needing the Police Depart--ments help knew he had to give them

something more to add to his original accusation against the petitioner. So in order to keep the Investigators interest--ed and obtain his immunity, he accused the petitioner of also being involved with this alleged stolen merchandise.

As far as the charge of stolen merch--andise being stored on the petitioners property,again this charge should have never been made, for the petitioner had rented an office and basement to EMD Trucking. During the years that he had rented this space out, numerous truck--loads of freight were brought in and out of the office and the basement, and there was just no possible way for the petit--ioner to have known whether or not that freight was stolen or legitimate, nor was it any of his business,[A-111,112,113].

In the charges of arranging for the sale and delivery, and transporting this alleged stolen merchandise, the petition-

-er was accused of arranging for the sale of this property with a friend of his named Paul Budetti, who owned a Barber & Beauty supply business in Yonkers, N.Y. He was also accused of transporting this alleged stolen merchandise to his friends warehouse. These charges were impossible for the petitioner to respond to as there was no specific date as to when these crimes had occurred, and he had previous--ly denied these accusations at the Hear--ing prior to the start of the Police Trial. On May 9, 1986, these charges were rebutted by Mr. Paul Budetti who testi--fied under oath, without the promise of any immunity, that he never obtained any merchandise through anyone he belived connected with the trucking firm located at 60-35 Fresh Pond Road, or had any business dealings connected with that location,[A-127]. In fact Mr. Rosso did not corroborate the accusations that

Arminante had made against the petitioner or Mr. Budetti, about the alleged stolen merchandise. Mr. Rosso testified that he did meet a couple of people, who George told him, came from Yonkers, who examined the stolen merchandise, but that he did not remember the names of anybody that came,[A-128,129]. Mr. Budetti also testi--fied that he had visited the petitioners residence at 60-35 Fresh Pond Road, about 5 or 6 times on social occasions, and that while he was there, he had been in the office downstairs once or twice, which he knew was a trucking firm, but did not remember the name of it. He also stated that he had met someone named "George" and several other people, and that he probably had conversation with them, but did not remember if he did, or what that coversation may have been about. He also stated that while he was there, he handed out one of his business

cards,[A-26-29]. Mr. Arminante was always hanging around the EMD Trucking office as he was hired by the owner George Demaria on a part time basis to drive a truck if he needed him. When the petitioner brought Mr. Budetti into the office and introduced him to"George", Mr. Arminante was probably one of the other people that were hanging around. Mr. Arminante was the one who made the accusations, and he either had Mr. Budett's business card or it's information written down for future reference, that was how he was able to supply the Police Investigators with detailed information about Mr. Budetti, on October 24, 1984,[A-23,24]. At that time, Mr. Arminante stated that a Paul of Imperial Barber & Beauty Supply Company, 567 Central Avenue, Yonkers, N.Y. and the petitioner had arranged for the sale of this alleged stolen merchandise, and that they delivered this load to 945 Yonkers

Avenue. On October 15, 1984, nine days prior to that statement[A-22],he told the State Special Prosecutor that the petit--ioner arranged for the stolen property to be bought by an UNKNOWN man from Yonk--ers, and that they delivered this stolen merchandise to an UNKNOWN location. Just where did Mr. Arminante go to get the detailed information he supplied them with about mr. Budetti. Mr. Arminante is nothing more than a career criminal who knows how to use the Police Department everytime he is in trouble with the LAW. CHARGES# 6,7 stated that Det. DiMicco, sometime in 1982, did sell Cocaine on 2 occasions for $200.00, did supply a quantity of Marijuana to a male known to this Department.

The accusations were made by Anthony Rosso, and are so absurd they never should have been made, as Mr. Rosso testified that there was no one else

present, when these alleged transactions occurred,[A-105].

Also on CHARGE# 1, that Det. DiMicco allowed quantities of propanone to be stored on his private property.

This charge was also disproven by the Police Departments main witness, Their C.I., Mr. Arminante, who testified that the propanone was not stored at the petitioners building, 60-35 Fresh Pond Road, but was stored at the basement of John Schuster's home, and was transferred to the basement of his home for storage, [A-86-89].

This Newly Discovered Evidence cast a definite doubt on the credibility of the Internal Affairs Investigators, and the accusations and testimony of the Police Departments two witnesses. The standard for newly discovered evidence is rigorous one. See NY CPLR 5015; Fed.R.Civ.Pro. 60 (B)(2). First,the evidence must have been

newly discovered subsequent to trial. Second, the evidence must not have been available at trial despite the exercise of due diligence. Third, the new evidence must be material, neither cumulative nor impeaching, and of such a nature that a new trial probably would produce a dif--ferent result. Yachts America, Inc. v. United States, 779 F.2d 656, 662 (Fed. Cir. 1985) (quoting Warner v. Transamer--ica Ins. Co., 739 F.2d 1347, 1353 (8th Cir. 1984); see also United States v. Walus, 616 F.2d 283, 287-88 (7th Cir. 1980); In re Commercial Structures, Inc. v. City of Syracuse, 97 A.D.2d 965, 468 N.Y.S.2d 957, 958 (A.D. 4 Dept. 1983) (noting that the "New York rule [of CPLR 5015] was intended to be similary applied [as was Fed. R. Civ. Proc. 60(b)(2).... [o]nly evidence which was in existence but undiscoverable with due diligence at the time of judgment may be characterized

as newly discovered evidence"). In the case at bar, petitioner meets all of the above strict criteria for the introduc--tion of newly discovered evidence, which is supported by the foregoing facts in this case.

Petitioner Has A Property Interest In His Job With the New York City Police Department Which Invokes the Procedural Due Process Protections of the Fourteenth Amendment of the United States Constitution.

On the above issue the petitioner will have to cite (pgs.3,4 and top of 5) of his Memorandum Of Law, previously submit--ted to the District Court.

Defendants Violated Petitioner's Constitutionally Protected Right to Due Process by Failing to Fully Apprise Him Of the Charges

The first fundamental of due process is notice of the charges made. Due pro-

-cess requires that a respondent in an administrative proceeding have fair notice of the charges against him or her so that he or she may prepare an adequate defense and thereby have an opportunity to be heard. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978); Block v. Ambach, 73 N.Y.2d 323, 540N.Y.S.2d 6. (Ct. App. 1989). Where courts are involved with such a fundamental constitutional right as the right to be put on notice of the charges made, prejudice is to be presumed. Matter of Shapiro v. Board of Regents, 16 N.Y.2d 783, 262 N.Y.S.2d 503; Matter of Hecht v. Monaghan, 307 N.Y. 461.

For further legal argument on the above issue, the petitioner will have to cite (pgs. 5 thru 10) of his Memorandum Of Law, submitted to the District Court.

Res Judicata Should Not Bar

Petitioner From Commencing This Action

When the petitioners case was in the New York State Courts, this case was in the hands of his then attorney Richard Tannenbaum, who proceeded mainly under laws that were in effect at that time, Matter of Berenhaus v. Ward, 118 AD2d 196, and not the inequities committed by the New York City Police Department. Even if the petitioners attorney had brought up all the inequities, part of the evi--dence showing some of the inequities were suppressed by the Trial Commissioner during the Police Trial. At the Police Administrative Trial, the Trial Commiss--ioner allowed the defendants witnesses to make blatant unsubstantiated accusa--tions against the petitioner. The petit--ioners attorney then attempted to intro--duce evidence which established that the witnesses accusations were not true. The Trial Commissioner adamantly refused to allow petitioners attorney to introduce

this evidence. This concealed crucial facts from becoming part of the Trial Records, which would never be the subject of review by anyone, including the New York State Courts. Furthermore, procedur--al due process forbids an administrative agency to use evidence in a way that forecloses opportunity to offer contrary presentation. Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 95 S. Ct. 438, 419 U.S. 281 (1974).

On November 17, 1987, Chief Judge Sol Wachtler, New York State Court of Appeals reversed both of Judge Francis T. Murphy's decisions on the Berenhaus v. Ward and the Farry v. Ward cases. No. 269 Matter of Berenhaus v. Ward, No. 270 Matter of Farry v. Ward.

The Court of Appeals reversed and declared: We granted leave in both cases to consider the extent to which the rule requiring corroboration of accomplice

testimony in criminal proceedings (see CPL 60.22) applies in Administrative Hearings-specifically police disciplinary matters-involving charges of misconduct of a criminal nature. We conclude that corroboration is not required in such proceedings.

They also stated: It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness, is largely unreviewable by the Courts, who are disadvantaged in such matters, because their review is confined to a lifeless record. For this reason and because statutory and, in our case Constitutional Constraints on the Courts Fact-Finding Powers.

They further stated: If the Hearing Offi--cer has recognized the dangers and never the less found the accomplice testimony worthy of belief, then the concerns which gave rise to the corroboration rule

should abate. A demand for more can only reflect an unwarranted distrust of the Hearing Officers ability to assess the relevant factors, and would breach the statutory constraints imposed upon our review of Administrative Determinations.

This decision has rendered any future appeals from Police Administrative Trials to the New York State Courts, totally useless, especially if the charges of misconduct are of a criminal nature, and the Hearing Officers determinations stem from the uncorroborated testimony of an alleged accomplice, such as in the petitioners case.

Based on the facts of this decision, the New York State Courts are Deficient to handle appeals from Police Administra--tive Trials, and res judicata should not bar the petitioner from commencing this action.

For further legal argument on the

issue of res judicata, the petitioner will have to cite (pgs. 25 thru 27) of his Memorandum Of Law, submitted to the District Court.

The way the system is set up now, any Police Officer who is found guilty at a New York City Police Administrative Trial on the on the uncorroborated testimony of an alleged accomplice, has no recourse no matter how unfair that trial may have been, and this violates their Constitutional Right to Due Process.

The New York State Court Of Appeals has granted Trial Commissioners the absolute power, to make unquestioned determinations at New York City Police Administrative Trials. This kind of power is a breeding ground for corruption, and in the petitioners Police Administrative Trial, the Trial Commissioner totally abused his powers, and violated the law.

It took the United States Supreme

Court a long time, to correct most of the inequities in the Criminal Laws of this country, and it's time the United States Supreme Court did something to correct some of the inequities of our Civil Laws.

The United States Congress passed the Employee Retirement Income Security Act in 1974, ERISA. Under this law private company pension benefits can no longer be forfeited for any reason, but this law does not apply to City or Government pension plans. Some Government plans have adopted this reform, but New York City has not. The laws of ERISA certainly do not seem fair or correct, for how could a law be passed to protect only some of the people, and not be made to include all of the citizens of this United States. This Law is Unconstitutional, as it discrimi--nates against anyone who works for local Governments that have not adopted these reforms. If the laws are allowed to

remain the same way they exist today, then unfair Police Trials will continue to flourish in New York City, and possi--bly wherever the laws of ERISA have not been adopted. Veteran Police Officers will continue to be swindled out of their jobs and pensions by unscrupulous individuals who work for local Government and abuse their powers, to further their own interests. A simple way to put an end to this type of potential corruption, would be to compel all local Governments to adopt the laws of ERISA.

The petitioners case is typical of what was brought out by the news media, during the recent Mollen Commission Hear--ings, held in September and October of 1993. These hearings dealt with police corruption within the New York City Police Department. The hearings and the news media showed how incompetent Investigators from the Police Departments

Internal Affairs Division and the Field Internal Affairs Unit allowed police corruption to flourish in New York City. They also showed how these same Investi--gators sometimes LIED in their Police Reports to CREATE CASES against Police Officers, where NONE existed. In the petitioners case, the Investigators took an accusation that was made by a known career criminal, who needed their help to stay out of jail, as gospel, instead of first trying to find out if this accusation was true or false. After helping this career criminal stay out of jail, these Investigators proceeded to try to support the accusation he had made. One year and four months later, these same Investigators allowed themselves to be used again, by the same career criminal who again needed their help to stay out of jail. After he had obtained their help, this career criminal made several more

unsubstantiated accusations against the petitioner. The Police Reports (Discovery Material) show that after almost 3 years, these Investigators were UNABLE to come up with one shred of evidence to support these accusations. In a desperate attempt to try to support these accusations and create a case against the petitioner, these Investigators and the Prosecutor from the Police Departments Advocates Office, made a deal with a convicted felon who was serving a prison term, and would have done or said anything to shorten his stay in jail. The Investiga--tors and the Police Departments Prosecu--tor knew that they really had no substantial case against the petitioner, so they purposely withheld evidence to make their main charge vague, and then made further charges out of every unsub--stantiated accusation that had ever been made during the course of their 3 year

investigation. None of these outrageous charges would have ever been entertained in a real Court of Law. However, with the help of a dishonest Trial Commissioner, these charges were not only entertained at the Police Trial Room, but the Trial Commissioner actually found the petitioner guilty of all the charges, even the charges that had been disproven.

The newly discovered evidence proves that the petitioner was nothing more than a victim of these unscrupulous Police Investigators, who had created a case where none existed. Further proof that the petitioner was really innocent of all of their outrageous charges, is shown in the abundance of lies that were told by the Trial Commissioner in his 23 page Written Decision to the Police Commission--er.

The petitioner in this case was a ded--icated Police Officer for 20 years, and

for 2½ of those years, he risked his life by going deep undercover to infiltrate Organized Crime, where he gathered intelligence information and acts of corruption within the New York City Police Department,[A-130-136]. He was never charged or found guilty of any crime involved in this case, yet he was not only Dismissed from the Police Department, but was also forced to forfeit all of his pension benefits.

The petitioner has been struggling with this matter for almost 8 years now, and he turned to his United States Government for justice, because the New York State Courts are very limited in their review of Police Administrative Trials. Surely the United States Supreme Court should be able to do something to correct this injustice, for if not, then all of the petitioners hopes are totally lost.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

PRO SE
Thomas DiMicco
60-35 Fresh Pond Road
Maspeth, N.Y. 11378

(718) 366-4965

APPENDIX

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of September one thousand nine hundred and ninety-three.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE RALPH K. WINTER,

Circuit Judges,

HONORABLE MILTON POLLACK,

District Judge*.

THOMAS DIMICCO,

Plaintiff-Appellant,

- v. - No. 92-9259

CITY OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, RAYMOND KELLY, ARTICLE III POLICE PENSION FUND,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by the plaintiff pro se and by counsel for defendants.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

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* Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

Plaintiff pro se Thomas DiMicco appeals from a judgment of the United States District Court of the Southern District of New York, Richard Owen, Judge, summarily dismissing his complaint brought pursuant to 42 U.S.C. § 1983 against the City of New York, et al., alleging that proceedings leading to his dismissal and loss of employment rights violated his right to due process. Finding no basis for reversal, we affirm.

The judgment against DiMicco in his prior state-court proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules bars him from relitigating his claims that the Police Department's disciplinary proceeding was conducted improperly. See, e.g., Migra v. Warren City School District Board of Education, 465 U.S. 75, 81-82 (1984); D'Arata v. New York Central Mutual Fire Insurance Co., 76 N.Y.2d 659, 664, 563 N.Y.S.2d 185,

192, 445 N.Y.S.2d 68, 71 (1981); Murphy v. Town of Southampton, 168 A.D.2d 545, 563 N.Y.S.2d 94 (2d Dept. 1990) (mem.).

Nor do we see any error in the district court's dismissal of DiMicco's § 1983 claim on which relief could be granted under § 1983, DiMicco did not make a persuasive showing that he met the standards for the granting of a rehearing.

We have considered all of DiMicco's arguments on this appeal and have found them to be without merit.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DiMicco v. City of New York, et al.

89 Civ. 5120

ENDORSED MEMORANDUM

Owen, District Judge:

I have read the DiMicco administrative hearing transcript and it appears that

DiMicco never made any effort at the hearing to fix the dates that the stolen goods were received by, or delivered out of United States Customs. DiMicco now proffers as "newly discovered evidence" alibi evidence to explain his whereabouts just on the days the goods were received by Customs, and no other (DiMicco was only shown to have been involved with one such shipment). DiMicco, I note did not take the stand and controvert the testimony of two witnesses who, while concededly of ill-repute, nevertheless placed him specifically and actively in highly damaging situations, albeit without specificity as to dates. Consequently, the proposed evidence (i.e., bills of lading, detective assignment sheets, and supporting affidavits), however, is neither "newly discovered," nor does it perform the exculpatory task DiMicco assigns it.

DiMicco also seeks to introduce a federal FOIA form stating that no federal agency has any record of him being involved in any drug-related activity. This apparently contradicts a Police Department internal memorandum which was not offered at the hearing and, accord--ingly, has minimal relevance to the issue before the court.

Finally, while the constitutionality of New York City Administrative Code § 14-125 appears to be a troublesome issue, I need not, and do not, reach it.

Accordingly, defendants' motion for summary judgment is granted. So ordered.

Dated: October 8, 1992

New York, New York

Entered: October 15, 1992